

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
UNITED STATES OF AMERICA, : 13-cr-00607-JFB  
:   
- versus - : U.S. Courthouse  
: Central Islip, New York  
:   
KENNER, et al., : May 14, 2019  
Defendants : 1:21 PM  
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE ANNE Y. SHIELDS  
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: Calling case 13-cr-607, USA v.  
2 Phillip Kenner.

3 Please state your appearance for the record.

4 MS. LEONARDO: For the United States, Diane  
5 Leonardo, Madeline O'Connor, Matt Haggans, Assistant  
6 United States Attorneys, and also at counsel table is  
7 Special Agent Galiota (ph.).

8 THE COURT: Good afternoon.

9 IN UNISON: Good afternoon, your Honor.

10 MR. KOSTOLAMPROS: George Kostolampros. I'm  
11 from Venable, LLP on behalf of Danske Bank, and here with  
12 me are Kelly Shubic Weiner, and Doreen Martin.

13 THE COURT: Good afternoon. You can stay  
14 seated and speak into the mic. It's better that way.

15 MR. SOUTHER: Thank you, your Honor.

16 Thomas Souther, Freeh Sporkin & Sullivan. I  
17 represent the DCSL parties which include Diamante, Cabo  
18 San Lucas, LLC, the Mexican developer, Diamante Cabo San  
19 Lucas, SRL CV, KAJ Holdings, LLC., Diamante Properties,  
20 LLC and Ken Jowdy, together we refer to them as the DCSL  
21 parties.

22 THE COURT: Right.

23 MR. WOLINSKY: Good afternoon, your Honor.

24 My name is Marc Wolinsky. I'm a partner at  
25 Wachtell Lipton but I am here in my individual capacity

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1 today. I'm a homeowner at Diamante, and I've been  
2 coordinating with an ad hoc group of homeowners who  
3 collectively own in excess of \$50 million of property.

4 THE COURT: Okay. Very good. Good afternoon.  
5 And Mr. Kenner, you're here, as well.

6 THE DEFENDANT: Yes, ma'am.

7 MR. MULRY: Your Honor, Kevin Mulry from  
8 Farrell Fritz, also for the DCSL parties.

9 Good afternoon.

10 THE COURT: Good afternoon.

11 All right. So I know that you were previously  
12 before Judge Bianco, and that was in the context of  
13 having an order -- a preliminary order of forfeiture  
14 entered, and when the government presented that, there  
15 were objections, and those objections went to both the  
16 scope of the order, and the language of the order.

17 And I know that I read the transcript before  
18 Judge Bianco, and what he said was let's see if the  
19 parties can get together, and perhaps can agree to some  
20 language in the preliminary order of forfeiture that  
21 would serve to preserve the value of the assets,  
22 in effect.

23 I do believe, and let me ask the government  
24 this, when you were before Judge Bianco, part of the  
25 argument before him was what was subject to forfeiture.

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1 Is that right?

2 MS. O'CONNOR: That's right, your Honor.

3 THE COURT: Okay. So that was a forfeiture  
4 hearing, and then in the context of that, the issue of  
5 whether or not value could be preserved by some language  
6 you could agree to, right?

7 MS. O'CONNOR: That's exactly right, your  
8 Honor.

9 THE COURT: All right. So then you did have a  
10 meeting. You all had a meeting in March, I believe --  
11 sometime in March you had the meeting?

12 MR. KOSTOLAMPROS: Yes.

13 MR. SOUTHER: Yes.

14 MS. LEONARDO: Yes.

15 THE COURT: Right. So Judge Bianco said why  
16 don't you get together and meet, and see if you can work  
17 something out. Obviously, that didn't work out, but in  
18 the context of the meeting, was part of the meeting  
19 discussing what's subject to forfeiture or is that what's  
20 currently under submission before Judge Bianco. What's  
21 the government's position on that?

22 MS. O'CONNOR: The government's position is  
23 that as you had said, we were to meet to discuss language  
24 to preserve the value of the property, not to discuss the  
25 scope of the forfeiture, which is strictly within the

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1 Court's domain, rather than the third parties.

2 THE COURT: And is that something that was  
3 argued before Judge Bianco?

4 MS. O'CONNOR: The scope of the forfeiture?

5 THE COURT: Scope.

6 MS. O'CONNOR: Oh, yes, that was the whole  
7 nature of the forfeiture proceeding.

8 THE COURT: And that's under submission before  
9 him?

10 MS. O'CONNOR: It is, your Honor.

11 THE COURT: Okay. Let me ask you this, in the  
12 course of your meeting, had you discussed what the scope  
13 of the forfeiture is? Is that something that you would  
14 have put on the table, as part of your discussions?

15 MS. O'CONNOR: No, your Honor. In fact, I  
16 think that's why we're here today because we could not  
17 agree that scope was beyond the focus of that meeting.

18 The government's position is that we were to  
19 meet strictly to discuss any language that could be  
20 included to preserve the value of the property, not  
21 whether the property itself was forfeitable.

22 THE COURT: Right, and you weren't even open to  
23 that. Is that right?

24 MS. O'CONNOR: That's right, your Honor.

25 THE COURT: Okay. Let me hear from the other

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1 side just upon the issue of whether or not Judge Bianco  
2 (indiscernible) talking about the scope, whether you  
3 wanted to talk about the scope or do you think the scope  
4 is something that's presently under submission before the  
5 district judge? And since you're first up, you're  
6 sitting in the first spot, you speak.

7 MR. KOSTOLAMPROS: Well, we -- sure. Sure,  
8 your Honor. And again, your Honor, we represent Danske  
9 Bank --

10 THE COURT: Right.

11 MR. KOSTOLAMPROS: -- whose got \$180 million  
12 lien position as to the property.

13 THE COURT: Understood.

14 MR. KOSTOLAMPROS: And our understanding is  
15 each of the parties here raised objections essentially at  
16 that hearing --

17 THE COURT: Right.

18 MR. KOSTOLAMPROS: -- in letters, and judge  
19 Bianco recognized the concerns there, and part of those  
20 concerns was the scope of the forfeiture order, the  
21 proposed preliminary order of forfeiture, including what  
22 should be subject to forfeiture, ultimately.

23 And I think for our side here, we all believe  
24 that that's part of the scope and discussions with the  
25 government as to -- look, what's going to cause the least

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1 harm to innocent third-parties, which is what Judge  
2 Bianco asked the government to consider.

3 THE COURT: Right. I mean, I read what he said  
4 and I think the objectionable language that everybody  
5 that -- what's sitting on the defendant's side of the  
6 courtroom said, was the judge said well, how does the  
7 government know that you can handle -- I think it's  
8 handling a big resort like this, and maybe the government  
9 can work with you.

10 But look, at this stage in the proceedings  
11 under Rule 32(2), if you look at the rule, the rule says  
12 that as soon as possible, I think, after the verdict, the  
13 Court decides what is subject to forfeiture, and that's  
14 before Judge Bianco.

15 And then with respect to a preliminary order,  
16 if the Court finds it's subject to forfeiture, it  
17 promptly enters a preliminary order of forfeiture setting  
18 forth the amount, and directing forfeiture.

19 The language that the government suggested in  
20 the preliminary order does say that the government is  
21 authorized to seize; is that correct?

22 MS. O'CONNOR: That's correct, your Honor.

23 THE COURT: Now I know before Judge Bianco, the  
24 government had said no, we told the bank, and the bank is  
25 the senior lienholder here, right? Everybody's got skin

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1 in this game, and it's significant, and the bank is the  
2 one that brought up, you know, if you put in language  
3 that you're authorized to seize, that language by itself  
4 is going to really have a chilling effect on the resort,  
5 right, and on your all investment.

6           So I think what he said was you're just saying,  
7 okay, we don't intend to do it, wasn't enough, and that's  
8 really all I see that Judge Bianco had in mind when he  
9 ordered a mediation. Certainly in the nature of  
10 mediation, if both sides want to broaden that scope and  
11 work something out, of course I am here for that but I  
12 don't think the government is here to change what they  
13 think is subject to forfeiture.

14           I think that's something that there was  
15 significant submissions before the district judge, and  
16 that's under submission. If the government is not  
17 willing to sort of mediate that now --

18           And by the way, isn't there in the future  
19 contemplated, an ancillary proceeding where the rights of  
20 other third-parties might be allowed to be heard?

21           MR. KOSTOLAMPROS: Well, your Honor --

22           THE COURT: So wouldn't it affect -- you all  
23 agreeing, at this stage, sort of cut off those rights of  
24 other people that would be entitled to notice under an  
25 ancillary proceeding?

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1 MS. O'CONNOR: Absolutely, your Honor, which is  
2 why we would defer any kind of -- addressing any third-  
3 party interest at this time. It's not the appropriate  
4 time. That's why we would just limit these discussions  
5 to preserving the property until such time everyone's  
6 interests are litigated.

7 THE COURT: So let me ask the government, is  
8 there any movement on your part in taking out the  
9 language from the preliminary order that says sort of  
10 this stark -- this is subject -- you know, the government  
11 is authorized to seize, and perhaps substituting language  
12 that might reinstate what was the order of 2015? There's  
13 an interim order, right?

14 MS. O'CONNOR: There's a protective order.

15 THE COURT: Yes.

16 MS. O'CONNOR: So the Court had suggested that  
17 the third parties supply us with proposed modifications.  
18 When the government received them, we then incorporated  
19 them into a proposed POF that we resubmitted to them for  
20 their review. And at that time, we had also -- I think  
21 we had mentioned to the Court, that we had discussed a  
22 possibility of an interlocutory sale.

23 THE COURT: Okay.

24 MS. O'CONNOR: So, we had that. But we did  
25 include their suggested modifications to the extent

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1 possible that the protective order would be incorporated  
2 and would remain in effect.

3 THE COURT: What language is that because I  
4 don't think I have that.

5 MS. O'CONNOR: It's Exhibit 4 to the  
6 government's letter.

7 THE COURT: If somebody has it if someone --

8 MS. O'CONNOR: We can --

9 THE COURT: -- wants to read it to me from the  
10 other side, do you know what she is talking about?

11 MR. KOSTOLAMPROS: Well, I don't think we have  
12 a copy.

13 MR. SOUTHER: We don't have it.

14 MR. KOSTOLAMPROS: We don't.

15 THE COURT: I don't have that.

16 MR. SOUTHER: They were all -- they were  
17 submitted under sale and ex parte, your Honor.

18 MR. KOSTOLAMPROS: Right.

19 MS. O'CONNOR: It would be the proposed order  
20 that we sent to them in an email but we can provide the  
21 Court with a copy right now --

22 THE COURT: Yes, if you could do that because I  
23 would like to look at that language, and we can put a pin  
24 in that for a moment, and talk about the idea of a  
25 possible interlocutory seal -- sale because that seemed

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1 to be something that might have gone beyond what Judge  
2 Bianco had in mind, that the government might have been  
3 open to.

4 What's the status on that? Is that something  
5 that --

6 MR. KOSTOLAMPROS: Your Honor --

7 THE COURT: -- this side is interested in?

8 MR. KOSTOLAMPROS: If I can add to one point,  
9 just to backtrack a little bit.

10 THE COURT: Sure.

11 MR. KOSTOLAMPROS: I mean the government  
12 offered at the hearing before Judge Bianco, look, we'll  
13 add this language about, you know, seizure, but Judge  
14 Bianco asked the government to sit down and have a  
15 mediation with us to consider all our concerns, and all  
16 of our concerns -- I mean, you raised that there is a  
17 potential ancillary hearing.

18 THE COURT: Right.

19 MR. KOSTOLAMPROS: But in our letters, we  
20 raised look, the ancillary hearing doesn't solve the  
21 fundamental issue with the forfeiture here and the  
22 seizure of the resort, is that the resort will not be a  
23 going concern at that time, causing due process  
24 violations to Danske Bank, as well as to other third  
25 parties, before you even get to the ancillary hearing.

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1 THE COURT: You're saying that the mere passage  
2 of time is killing your investment.

3 MR. KOSTOLAMPROS: Right. And we've raised --  
4 it's not a matter of simply an ancillary hearing here.  
5 There are Mexican law issues here.

6 THE COURT: Right.

7 MR. KOSTOLAMPROS: The government would have to  
8 move in Mexico. Ultimately, I think the best route here  
9 is to either -- well, number one, there has to be equity  
10 value in the resort and there's a dispute as to whether  
11 there is any equity of value --

12 THE COURT: Now you're talking about doing an  
13 interlocutory sale, the first step in that being  
14 appraisal, right?

15 MR. KOSTOLAMPROS: Not even. Before then. The  
16 government needs to consider, pursuant to its own  
17 policies and procedures, as to whether there's equity  
18 value to even pursue forfeiture and seizure as to the  
19 resort.

20 THE COURT: Well, do they have to do that if  
21 they're doing a sale?

22 MR. KOSTOLAMPROS: Yes.

23 THE COURT: Okay.

24 MR. KOSTOLAMPROS: Yes.

25 THE COURT: Is the sale something that you need

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1 -- and let me ask the government. Is that something that  
2 you voluntarily sort of agreed to negotiated or is that  
3 something that the government is required to do at this  
4 stage of the proceedings?

5 MS. O'CONNOR: I'm sorry, your Honor, you're  
6 saying that we're required to do --

7 THE COURT: I'm talking about an interlocutory  
8 sale.

9 MS. O'CONNOR: The government's not required to  
10 conduct an interlocutory sale, although we suggest the  
11 idea --

12 THE COURT: Right.

13 MS. O'CONNOR: -- as a possible way to preserve  
14 value. It seemed to be something that was well-received  
15 by all, and we will --

16 THE COURT: So that seems to me to be something  
17 that maybe you all wanted to talk about but that's a  
18 negotiation that seems to have died during your  
19 discussions as to the best way to do it.

20 MR. KOSTOLAMPROS: And let me add why that's  
21 died. The reason why it's denied is because this is not  
22 something that is -- it needs to be presented in a way  
23 that all the parties have a position, and be involved,  
24 and be allowed to be involved in, number one, hiring an  
25 appraiser, number two, hiring --

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1 THE COURT: Right.

2 MR. KOSTOLAMPROS: -- a consultant that is  
3 going to be involved, and, you know, at the end of the  
4 day, we haven't been able to get that traction. I mean,  
5 the government has gone ahead and hired their own  
6 consultant through our own little -- our own due  
7 diligence, we haven't been able to find any experience  
8 that this person has as to a Mexican resort property of  
9 this size, beyond a resort here in the U.S. itself.

10 So all of those things raise concerns with us,  
11 and we have asked -- look, this has got to be a step-by-  
12 step proceed. Number one, if there -- we need an up-to-  
13 date appraisal. The appraisal -- we have differing  
14 appraisals. The government's appraisal is outdated, and  
15 frankly, we have disagreements with it. We think we need  
16 an appraisal based on assumptions of -- that are based on  
17 a sale now of the property as is, and that includes all  
18 the encumbrances that come with the properties --

19 THE COURT: It's all the debt, right?

20 MR. KOSTOLAMPROS: Right, because you have  
21 interested parties like Mr. Wolinsky here. If the  
22 obligations of the resort don't come with that sale,  
23 there's going to be over 6,500 innocent owners on the  
24 resort who will be harmed.

25 THE COURT: Right.

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1 MR. KOSTOLAMPROS: That needs to be taken into  
2 account.

3 THE COURT: So there's several bumps in the  
4 road obviously --

5 MR. KOSTOLAMPROS: Right.

6 THE COURT: -- of even proceeding with a sale.  
7 If it's the -- a sale is something that the government  
8 doesn't have to do but wants to talk about, that's one  
9 thing. I'm not sure the government even wants to talk  
10 about the sale. That's something that they would have  
11 put on the table to discuss.

12 Is that something the government wants to  
13 discuss because obviously there's discontent with the way  
14 the government is going forward with any appraisal, and  
15 that's the problem. If that's the bump in the road  
16 that's really insurmountable, and the government doesn't  
17 want to proceed with the sale, then we're sort of stuck  
18 there.

19 MS. O'CONNOR: The government was willing to  
20 discuss it as a means to resolving the issue about the  
21 preliminary order of forfeiture language so it could move  
22 on from there. That way, we could get the order entered,  
23 and then discuss in --

24 THE COURT: And then discuss the sale after  
25 that?

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1 MS. O'CONNOR: Correct, right. But since that  
2 doesn't seem to be a means to resolve the issues we have  
3 today, then there doesn't seem to be a point to continue  
4 those discussions at this juncture, it could be discussed  
5 after a preliminary order is entered and the ancillary  
6 proceeding is conducted, and then we can, you know,  
7 pursue that with the third parties at that time.

8 THE COURT: All right. I'm looking right now  
9 at the preliminary order of forfeiture, and this is  
10 what's been handed up to me, and the government has said  
11 that the -- it was provided in an email to all the  
12 interested parties. Is that or is that not the case? It  
13 is -- I'll tell you how many pages the document is. It's  
14 a six-page document.

15 MR. KOSTOLAMPROS: I believe it was. It was  
16 definitely provided to us, I believe.

17 MR. SOUTHER: The only order that I got was  
18 restated, was just a copy of what was originally  
19 submitted. I don't --

20 THE COURT: So the original preliminary order  
21 of sale -- preliminary order of forfeiture, I'm sorry,  
22 also a six-page document, and that's under document 607-  
23 1. And the one that I am looking at also six pages, and I  
24 think the different part would be paragraph 3. Let me  
25 ask the government, is that what's different about it?

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1 MS. O'CONNOR: No, your Honor. There's several  
2 differences, as we incorporated numerous of their  
3 proposed modifications.

4 THE COURT: Okay. So when -- I think the  
5 interlocutory sale is not something that the government  
6 wants to mediate or discuss. I think that's, from what I  
7 am hearing, I am not sure that's even worth going forward  
8 with. I also think the scope of the forfeiture is  
9 something that's already been argued, and it's under  
10 submission to Judge Bianco, and that's not here.

11 MR. WOLINSKY: Your Honor?

12 THE COURT: What's here is the language of the  
13 order of forfeiture.

14 MR. WOLINSKY: Let me put this in context. I  
15 was at the hearing with Judge Bianco.

16 THE COURT: Okay.

17 MR. WOLINSKY: My sense of it is not the sense  
18 that you have. My sense of it was that the judge was  
19 saying to the government, you do not understand the  
20 complexities, and consequences of what you're intending  
21 to do, and he therefore directed the parties to sit down  
22 and try and mediate.

23 THE COURT: Okay.

24 MR. WOLINSKY: I think Judge Bianco was very  
25 much in tune to the idea that the scope of the order --

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1 the scope of forfeiture being proposed was not one that  
2 he was necessarily prepared to enter. So for the  
3 government to come in here today and say they're not  
4 prepared to speak to the scope of the order, I don't  
5 think it's consistent with Judge Bianco's expectations.

6 But more importantly, it's not consistent --  
7 and this is the most important point -- it is not  
8 consiistent with preserving the value of the project.  
9 And everyone here is very much in tune to preserving the  
10 value of the project, and everyone --

11 THE COURT: I think the government should be in  
12 tune to preserving the value of the project as well. Am  
13 I right?

14 MS. O'CONNOR: We certainly are.

15 THE COURT: I think everyone wants that. Look,  
16 I am looking at the transcript of Judge Bianco's  
17 proceeding, and you tell me where he tells me that the  
18 scope of the forfeiture -- I get what you're saying.  
19 He's interested in having it run properly. He's  
20 interested in possibly taking out that authorized, seized  
21 language. That that language would have a chilling  
22 effect on sales, the going forward of the resort. That's  
23 what I am getting.

24 I am not getting -- unless the government is  
25 certainly open to it, because that's what mediation is

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1 about, but both parties have to be open to it,  
2 particularly in a criminal proceeding. This isn't a  
3 civil proceeding where, you know, we're sort of settling  
4 a civil case. This is a criminal proceeding. So the  
5 government really has to be open to changing things, and  
6 on notice to anybody who might be interested, and it is  
7 getting the way of Federal Rules of Criminal Procedure,  
8 which there are certain things they can do, and there's  
9 certain things that I think that they can't do.

10 Let me ask the government. I mean, does  
11 anybody have a piece that they want to read me of Judge  
12 Bianco's hearing where he talks about changing the scope.

13 What I have is I am just going to request, and  
14 this is at page 17, "That you try and hear all their  
15 concerns, and after hearing their concerns, submit  
16 another order, and that would be a preliminary order, to  
17 the Court, consistent with the government's objectives.  
18 You know, any modifications you could make to try to  
19 minimize any potential negative impact, the operation of  
20 the resort to innocent third parties."

21 So I --

22 MR. WOLINSKY: Your Honor --

23 THE COURT: -- just don't see it as opening the  
24 entire scope of the forfeiture, unless it's something the  
25 government is interested in, in the context of mediation.

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1 And if they're not, then the only thing that they're  
2 interested in, and that could possibly be helpful to you  
3 is changing that language with respect to the order of  
4 the seizure.

5 What I would like the government to do, and  
6 perhaps in connection with the other parties, is maybe  
7 take a short break, and maybe mark up what's new in this  
8 order, and then we can talk about that.

9 MS. O'CONNOR: The government can do that, your  
10 Honor.

11 MR. SOUTHER: Your Honor, may I just --

12 THE COURT: Yes.

13 MR. SOUTHER: -- add one observation. With  
14 respect to the wording from the transcript, and Judge  
15 Bianco, you know, I think we aren't parties to the  
16 criminal case, and as it's part of --

17 THE COURT: Right. You're third parties, by  
18 the way, that aren't really allowed to intervene at this  
19 stage, right?

20 MR. SOUTHER: And we weren't seeking to  
21 intervene but, you know, what we were trying to present  
22 to the Court was, you know, an alternative to the all or  
23 nothing alternatives that were being proposed.

24 THE COURT: No, I understand.

25 MR. SOUTHER: And, you know, one of the biggest

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1 concerns that certainly the DCSL parties have, and I  
2 think it's shared by the others, was the government's  
3 insistence on including the resort as a whole, as part of  
4 the forfeiture.

5 THE COURT: Which goes to the scope of the  
6 forfeiture.

7 MR. SOUTHER: And I think that -- I mean, my  
8 impression was, and obviously I have a bias, but my  
9 impression sitting there in the courtroom, and hearing  
10 Judge Bianco express those words, was that he shared that  
11 concern, and that's why I think he directed the third  
12 parties to sit down with the government to try and work  
13 it out as a way to try and minimize the dramatic chilling  
14 effect that that's going to have on the ability to move  
15 forward, and continue to sell real property, continue to  
16 sell timeshares. Continue to fund the cash flow that is  
17 necessary, just to meet the day-to-day obligations. This  
18 resort lives paycheck-to-paycheck right now.

19 THE COURT: I understand that but chilling  
20 effect is the chilling effect of language that says the  
21 government is authorized to seize the resort. I think  
22 that's what chilling.

23 You've been operating since 2015 under an order  
24 that says what? What does it say? Let me ask the  
25 government in terms of what you could do, what you could

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1 sell.

2 MR. SOUTHER: Well --

3 MS. O'CONNOR: There are no limitations on the  
4 sales of timeshares or individual lot owners --

5 THE COURT: And would you consider -- would  
6 that continue under the preliminary order of forfeiture?

7 MS. O'CONNOR: Yes, we --

8 THE COURT: Would you agree to that?

9 MS. O'CONNOR: -- specifically incorporate the  
10 protective order and the modification which permits those  
11 sales.

12 MR. KOSTOLAMPROS: Your Honor, if I may add,  
13 you know, look, we met with the government trying to come  
14 up with the language, and frankly to our astonishment, we  
15 were surprised that the government was taking the  
16 position that it wouldn't even recognize the interest of  
17 the 6,500 timeshare owners, and other land sale owners  
18 who have been sold already, pursuant to the Court's  
19 protective order, an allowance of that.

20 So what would that mean? We said look, if  
21 you're going to make that argument, and say that the  
22 property is subject to seizure, but you could go ahead  
23 and still sell timeshares, but everyone who buys that  
24 share has to come to this court or to the government and  
25 make the argument that they are a valid owner. There's

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1 no way one sale could go forward.

2 THE COURT: Isn't that what's been going on  
3 since 2015 and haven't there been sales since then?

4 MR. KOSTOLAMPROS: No, there haven't. The  
5 protective order --

6 THE COURT: The government is saying they're  
7 going to go along with exactly what's been in place since  
8 2015.

9 MR. KOSTOLAMPROS: The way the protective order  
10 is reads is, we've read it as it allows time shares sales  
11 and other sales to go forward. That implies that the  
12 Court is allowing that to go forward, without any --  
13 without subject to forfeiture.

14 There's even a --

15 THE COURT: I don't understand.

16 MR. KOSTOLAMPROS: -- that's the way that we've  
17 read it.

18 THE COURT: The government is saying that  
19 they're willing to do things exactly the way they've been  
20 done since 2015, right?

21 MS. O'CONNOR: That's exactly right.

22 THE COURT: No changes.

23 MR. KOSTOLAMPROS: Right, but when we met with  
24 them, they're saying that we won't recognize -- we will  
25 not recognize the timeshare sales that happened to date,

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1 which means that those owners would have to make a  
2 showing to the government or to the Court in an ancillary  
3 proceeding that they were rightful owners.

4 THE COURT: So these are prior sales that have  
5 happened?

6 MR. KOSTOLAMPROS: Prior sales.

7 THE COURT: Prior to 2015 or prior to the  
8 preliminary order of forfeiture?

9 MR. KOSTOLAMPROS: I'm not sure. I mean, my  
10 understanding is that it would apply to the 6,500 that  
11 have been sold.

12 THE COURT: That have already been sold.

13 MR. SOUTHER: To date.

14 MR. KOSTOLAMPROS: To date.

15 MR. SOUTHER: To date.

16 MR. KOSTOLAMPROS: To date.

17 MR. SOUTHER: So that would include both --

18 MR. KOSTOLAMPROS: Right.

19 THE COURT: So that --

20 MR. SOUTHER: -- prior to --

21 THE COURT: Let's ask. Let me ask because  
22 people looked confused over here.

23 MS. O'CONNOR: So, your Honor, I think what  
24 they're trying to say is they want the government to  
25 essentially conduct an ancillary proceeding without

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1 having conducted one and automatically recognize interest  
2 without having been provided any information or anything  
3 else. And the government is not in a position to do  
4 that, and it would be unfair to all potential claimants  
5 to the property.

6 So what we tried to do was stick to what the  
7 Court said, preserve value, right -- incorporate  
8 language, preserve value, and leave the ancillary  
9 proceeding issues to the ancillary proceeding.

10 THE COURT: Right. And at that proceeding,  
11 these people and anybody else could, upon notice, could  
12 come in and assert their --

13 MS. O'CONNOR: Interests.

14 THE COURT: -- rights.

15 MS. O'CONNOR: Which is what due process  
16 requires.

17 THE COURT: Right.

18 MR. KOSTOLAMPROS: Your Honor, there are 6,500  
19 owners, not all of them are U.S. citizen and --

20 THE COURT: Well, they would get whatever  
21 notice is necessary under due process, right?

22 MR. KOSTOLAMPROS: But --

23 THE COURT: That's what the ancillary  
24 proceeding is for.

25 MR. KOSTOLAMPROS: Right, but how would the

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1 resort survive during that time period?

2 THE COURT: How has the resort survived this  
3 long?

4 MR. KOSTOLAMPROS: It couldn't --

5 MR. SOUTHER: Your Honor?

6 MR. KOSTOLAMPROS: It survived through the  
7 allowance of the protective order that allows these sales  
8 to go forward.

9 THE COURT: Again, you're allowing --

10 MR. KOSTOLAMPROS: Which would continue, your  
11 Honor.

12 THE COURT: -- the sales to go forward. I just  
13 feel like the government keeps saying we're going to let  
14 things continue the way they have been, and maybe that's  
15 language you all need to talk about.

16 So what I am going to -- I'm taking a break. I  
17 want you to take a look over this together, and then come  
18 back because I have a couple of other criminal  
19 proceedings to do, and then we'll talk about this. Once  
20 I see -- I'd like a marked up version of this versus the  
21 original preliminary order of forfeiture. You can get  
22 that to me.

23 MS. O'CONNOR: Okay.

24 THE COURT: We'll do a -- let's take a half  
25 hour.

Proceedings

1 (Off the record.)

2 THE CLERK: Calling 13-cr-607, United States of  
3 America v. Phillip Kenner.

4 THE COURT: Okay. We don't need to have the  
5 appearances. We're just back on the record. So I know  
6 we took a break to talk. I know you've had some  
7 discussions. Let me hear from the government what's  
8 going on, if anything.

9 MS. O'CONNOR: Well, your Honor, what we have  
10 for you is three copies of the preliminary order of  
11 forfeiture. First, the order that was submitted as an  
12 attachment on the docket entry 607-1 --

13 THE COURT: Right.

14 MS. O'CONNOR: -- then we --

15 THE COURT: That's the original one.

16 MS. O'CONNOR: Yes.

17 THE COURT: Uh-hum.

18 MS. O'CONNOR: Then we have for you the redline  
19 copy that was provided to the government by the third  
20 parties with their suggested modifications, and then we  
21 have our proposed order that was -- we provided to the  
22 third parties for their review.

23 THE COURT: Okay. So obviously there's no  
24 agreement, right? So you need me to take some time to  
25 look at it so we can talk about t?

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1 MS. O'CONNOR: Sure. And if it would help the  
2 Court, we could go through --

3 THE COURT: If you want to just go through it  
4 line by line, maybe it's a good use of time?

5 MR. KOSTOLAMPROS: Your Honor, I don't know if  
6 it is frankly. I think, you know, we've asked for two  
7 fundamental things before we could even agree to move  
8 forward and have a conversation.

9 THE COURT: Okay. Well, why don't you tell me  
10 what those are --

11 MR. KOSTOLAMPROS: I will --

12 THE COURT: -- because it's probably stuff I  
13 already know about.

14 MR. KOSTOLAMPROS: -- that's what I think,  
15 we'll just cut to the chase.

16 THE COURT: Yes, let's do that because nobody  
17 is sitting behind you at the moment that has to be here,  
18 so let's do it.

19 MR. KOSTOLAMPROS: Right. So I mean, so the  
20 two fundamental issues, before we even get sort of into  
21 the specifics are one, is deletion of language, the  
22 seizure language, that the resort is subject to seizure.

23 THE COURT: And what paragraph is that?

24 MR. KOSTOLAMPROS: Paragraph 3. And the draft  
25 that's title or that has -- it says draft subject to

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1 further government review, March 29th, 2019.

2 THE COURT: Yes. I am with you.

3 MR. KOSTOLAMPROS: And then the other point is,  
4 recognizing property owners who have purchased timeshares  
5 and land sales, previously purchased them, and those  
6 going forward. And again, that gets to our point --  
7 look, that's going to completely harm the resort. The  
8 resort will not be able to continue on as a going  
9 concern, and if the interest here is ultimately to get  
10 value out of the resort, there will be none.

11 THE COURT: And the government -- I mean, what  
12 do you say to that because that's the core of it, right?  
13 Is that something that you fundamentally disagree with,  
14 and you think it's an ongoing concern, and there's not a  
15 danger of all these loans being called in and the entire  
16 resort collapsing, because that's essentially what the  
17 defendants are saying, right?

18 MR. KOSTOLAMPROS: Right.

19 MR. WOLINSKY: Yes, your Honor.

20 MS. O'CONNOR: Well, your Honor, what we said  
21 to them in response is that they had the same concern  
22 with the protective order, and yet the sales have  
23 continued. The protective order was very clear that the  
24 property was subject to forfeiture. That hasn't stopped  
25 the sales. In fact, Mr. Jowdy's letter, and DCLS's

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1 letter says they're meeting sales goals.

2 So clearly, it's not having the cloud that they  
3 claim it will, and if everything were to continue status  
4 quo, which is what they asked from us in the first place,  
5 then we don't understand why now it's a problem, and the  
6 government is not able to continue with the status quo.

7 THE COURT: I'm looking at the paragraph 3 of  
8 both the government draft and the proposed draft, and  
9 that's the blue underline, and the government is the  
10 yellow highlighting.

11 MS. O'CONNOR: Yes.

12 THE COURT: And I think the big problem that  
13 the parties are having is paragraph 3 says upon -- the  
14 government says, "Upon entry of this preliminary order,  
15 the U.S. Attorney General or its designees, and this is  
16 the language, is authorized to seize the forfeitable  
17 assets and to conduct proper discovery in accordance with  
18 Rule 32.2." And that tracks exactly the statutory  
19 language.

20 "And it to commence any proceedings to comply  
21 with the statutes governing third-party rights," and you  
22 envision that to be in the ancillary proceeding but the  
23 language that I am looking at that the government has is  
24 basically cut and past from the statute, is it not?

25 MS. O'CONNOR: It is, your Honor.

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1 THE COURT: Okay. And what is proposed and the  
2 government could agree to if they want to but don't have  
3 to, says, "Upon entry of the preliminary order, the  
4 United States Attorney General or its designee," and it  
5 just says, "is authorized to conduct proper discovery,"  
6 taking out "is authorized to seize the forfeited assets."

7 Now in the government's, is there anything that  
8 in your view, softens the word to seize the forfeited  
9 assets?

10 MS. O'CONNOR: So, your Honor, at the time we  
11 were not willing to adopt that modification because it  
12 affected all of the forfeitable assets including a  
13 Falcon-10 Airplane that the government has seized, and  
14 needs this language to continue to hold.

15 So we're not able to do that but what we did  
16 indicate is that we would be willing to modify the  
17 language to say something to the effect that the  
18 government -- something, however, the United States will  
19 not seize the DCSL property. We can define it, which  
20 would be I guess at subparagraph A, prior to the entry of  
21 a final order of forfeiture or further order of the  
22 Court.

23 THE COURT: So you are willing to say the  
24 government will not seize prior to the final order of  
25 forfeiture?

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1 MS. O'CONNOR: Yes, we're willing to say that.

2 THE COURT: And that's not good enough for the  
3 defendants?

4 MR. KOSTOLAMPROS: It's not because the issue  
5 is we -- when we first proposed some modification to the  
6 language, we assumed that the government wasn't  
7 challenging ongoing sales. It's only when we met with  
8 the government in person after Judge Bianco had his  
9 hearing, did we realize that the government was taking  
10 that position.

11 And frankly, it's both of this language that's  
12 important, it's not just the seizure language but it's  
13 also recognizing prior sales, and ongoing sales,  
14 because --

15 THE COURT: And where is that language  
16 reflected in your draft?

17 MR. KOSTOLAMPROS: In our draft?

18 THE COURT: With respect to -- yeah, what did  
19 you want it to say with respect to reflecting past sales.

20 MR. KOSTOLAMPROS: Sure. Paragraphs 4 and 5,  
21 your Honor.

22 THE COURT: And that's paragraph 4, I'm looking  
23 at, and that is not at all in the government's, but also  
24 the government doesn't have in the copy to me what they  
25 just said. However, the government will not seize.

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1 MS. O'CONNOR: That's correct, your Honor.

2 THE COURT: Okay. Let me just take a look at  
3 what is in paragraph 4, and then I'm just going to -- on  
4 the third-party side, right? "None of the real property  
5 and premises in Mexico, known as" -- and that's this  
6 resort, -- "is subject to forfeiture". You want them to  
7 say that none of that is subject when, in fact, it  
8 clearly is subject to it. Just their agreement won't be  
9 seized, and I'm assuming if I'll go back to the  
10 government, you would object to saying none of this is  
11 subject to forfeiture because that's a final finding as  
12 to forfeiture, is it not?

13 MS. O'CONNOR: That's exactly right.

14 THE COURT: Okay.

15 MS. WEINER: If I could interject, your Honor,  
16 our position in our version you have with the blue  
17 markup, we took the position that the forfeitable assets  
18 excluded the real estate and were the U.S. held equity  
19 interest only.

20 THE COURT: I get it. And that's your position  
21 but that's what's got to be ruled upon as to the final  
22 order of forfeiture, and as I said before, I think --

23 MR. KOSTOLAMPROS: Your Honor, if I may, your  
24 Honor?

25 THE COURT: Yes.

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1 MR. KOSTOLAMPROS: Just getting to that point,  
2 I mean you raised -- look, you didn't believe that Judge  
3 Bianco had or basically allowed for this to be a  
4 discussion about scope but --

5 THE COURT: Not that he didn't allow for the  
6 discussion, because he certainly did allow for any  
7 discussion --

8 MR. KOSTOLAMPROS: Right.

9 THE COURT: -- but it's kind of the government  
10 has to want to discuss it, and sort of mediate it, but as  
11 I said earlier, it's not a case where the government has  
12 to --

13 MR. KOSTOLAMPROS: But let me add --

14 THE COURT: -- they're willing to have a  
15 conversation because at this stage of the proceeding,  
16 you're third parties, right?

17 MR. KOSTOLAMPROS: Right, but let me --

18 THE COURT: And you don't have the absolute  
19 right to talk about it unless the government wants to.

20 MR. KOSTOLAMPROS: But we raised the  
21 ramifications which will ultimately harm the value of the  
22 resort, and the Court said -- this is after a long  
23 colloquy said look, I know, this is the Court --

24 THE COURT: Uh-hum.

25 MR. KOSTOLAMPROS: -- commenting to Ms.

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1 Connor's arguments, I know but --

2 THE COURT: This is you talking or who is  
3 talking?

4 MR. KOSTOLAMPROS: This is the Court talking,  
5 Judge Bianco.

6 THE COURT: So you're reading from Judge  
7 Bianco's --

8 MR. KOSTOLAMPROS: I'm reading -- this is the  
9 transcript on page 13.

10 THE COURT: Okay.

11 MR. KOSTOLAMPROS: "I know, but they're  
12 suggesting -- they're suggesting being the third  
13 parties" --

14 THE COURT: Right.

15 MR. KOSTOLAMPROS: -- "that this could then be  
16 tied up for years, years, and years" --

17 THE COURT: Uh-hum.

18 MR. KOSTOLAMPROS: -- "in the Mexican  
19 government, and that the government in forfeiting this  
20 property, could be harming the very victims who the  
21 government in this case is trying to make whole and  
22 innocent third parties who had nothing to do with this  
23 case."

24 THE COURT: Right.

25 MR. KOSTOLAMPROS: "So why wouldn't the

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1 government consider all those things? Have you ever met  
2 with them and tried to understand what the ramifications  
3 would be? I assume the government doesn't understand  
4 every aspect of what the implications would be of  
5 forfeiting the entire resort."

6 And that to us is why would he even have been  
7 talking about Mexican law -- Mexican law only applies if  
8 you're applying forfeiture as to the entire resort. And  
9 I believe Judge Bianco, at least as we all took it he  
10 said look, go back and talk, how can you get the value  
11 that you want ultimately to --

12 THE COURT: Right.

13 MR. KOSTOLAMPROS: -- victims and not hurt  
14 innocent shareholders.

15 THE COURT: Not hurt additional.

16 MR. KOSTOLAMPROS: And, your Honor, getting --  
17 how you do that I think fundamentally starting off with  
18 an appraisal of the property to Government Exhibit an  
19 understanding of what that property is really valued at.  
20 We've had settlement discussions with the government  
21 prior to two years ago frankly --

22 THE COURT: Uh-hum.

23 MR. KOSTOLAMPROS: -- where, you know, we  
24 discussed potential options. I think if there's an  
25 appraisal here, that would set realistic expectations as

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1 to what potentially a settlement could look like to move  
2 forward.

3 THE COURT: Let me hear from the government on  
4 that.

5 MS. O'CONNOR: Well, your Honor, first when we  
6 spoke, the Court asked us if we had considered it, and we  
7 told the Court that we had, in fact, spoken with the  
8 bank, and the bank's concerns were one, was the  
9 government going to go in and physically seize the  
10 property, and two, what about the protective order, and  
11 our --

12 THE COURT: Are you concerned with how the  
13 property is being managed at this point, I mean in terms  
14 of just maintaining status quo?

15 MS. O'CONNOR: Your Honor, the government does  
16 have certain concerns that it's being run by Jowdy, who  
17 is somebody that the government feels is an unindicted  
18 co-conspirator.

19 THE COURT: But what about all of the debt on  
20 the property, and things of that nature?

21 MS. O'CONNOR: Well, that is why the government  
22 suggested an interlocutory sale, which seemed to be a  
23 resolution that would resolve all concerns.

24 THE COURT: And that's a sale of the entire  
25 property, right?

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1 MS. O'CONNOR: The entire resort, the money  
2 would be held --

3 THE COURT: But the first step in that sale  
4 process would be an appraisal, is that right?

5 MS. O'CONNOR: Yes. And, in fact, we took  
6 steps to have an appraisal performed but then --

7 THE COURT: And they don't like your appraiser.  
8 They don't like your person. They want somebody else.

9 MS. O'CONNOR: Well --

10 THE COURT: So you can't even agree on who is  
11 going to appraise it?

12 MR. KOSTOLAMPROS: Your Honor, there's a  
13 fundamental difference --

14 THE COURT: As a first step?

15 MR. KOSTOLAMPROS: I mean, your Honor, here you  
16 have sophisticated parties who know the property --

17 THE COURT: Well, no, I think you know best,  
18 right?

19 MR. KOSTOLAMPROS: I mean, why wouldn't they  
20 involve us? I mean we have appraisers who -- our  
21 appraisers who have already appraised that property, know  
22 it extremely well. They do appraisals in Mexico all the  
23 time. These are large entities that do that. But again,  
24 the government's going about this all on its own, exactly  
25 contrary to what Judge Bianco said, and said look, you

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1 have sophisticated parties who know what they're doing .  
2 What makes you think, government, that you know what  
3 you're doing?

4 MS. O'CONNOR: Your Honor, the government has  
5 contracted with third parties that perform these  
6 appraisals.

7 THE COURT: So these appraisals are done at the  
8 government expense as well, is that right?

9 MS. O'CONNOR: Yes.

10 THE COURT: Do you -- are you interested at all  
11 in going down a road where the other side would pay for  
12 appraisals, and maybe you look at them, and consider it  
13 but in the meantime -- I mean, if you're interested.  
14 Again, you don't have to be because you're the  
15 government, you don't have to but if you are interested,  
16 and I believe everyone is interested in preserving value,  
17 would it be a good road to go down to enter a preliminary  
18 order today that says that there's not going to be any  
19 seizure. The government agrees there will be no seizure  
20 and you can show that to people, and that basically is a  
21 status quo order. Right?

22 So you can continue selling and managing the  
23 property but while that order is signed, and that will  
24 obviously have to be signed Judge Bianco, talking to each  
25 other about an appraisal process, having the third-

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1 parties pay for an appraisal, so it's not a government  
2 expense, and then the government can have a chance to  
3 look at it, have its own appraiser look at it, and then  
4 maybe go down the road to a sale, and that sale can take  
5 place before an ancillary proceeding. Is that correct?

6 I'm asking the government, under the law --

7 MS. O'CONNOR: So --

8 THE COURT: -- or is it a part of that  
9 proceeding?

10 MS. O'CONNOR: It could be worked in  
11 conjunction but the government would need to know every  
12 third-party claimant in order to make sure that everyone  
13 has a right --

14 THE COURT: Right.

15 MS. O'CONNOR: -- a say in that process.

16 THE COURT: But could you -- if you had the  
17 order -- the preliminary order signed, with this or a  
18 status quo language in it, and parties go down the road  
19 toward the appraisal process, and maybe the ancillary  
20 proceeding is something that could be speeded up in some  
21 way?

22 MS. O'CONNOR: That could be -- that could  
23 commence as soon as a preliminary order is entered, which  
24 is what we've been saying.

25 THE COURT: So without the preliminary order,

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1 nothing happens.

2 MS. O'CONNOR: Exactly.

3 THE COURT: There's no next steps.

4 MS. O'CONNOR: That's exactly right.

5 THE COURT: But you would be interested in  
6 looking at their appraisal if -- are you willing to pay  
7 for an appraisal on your side of the table there?

8 MR. KOSTOLAMPROS: I believe we would be,  
9 right?

10 UNIDENTIFIED SPEAKER: Right.

11 THE COURT: And is that something that the  
12 government would be open to looking at?

13 MS. O'CONNOR: We would --

14 THE COURT: You've already paid for yours,  
15 right?

16 MS. O'CONNOR: We have discussed having an  
17 appraisal performed, but the process was halted once our  
18 discussions, you know, fell apart but we would certainly  
19 want to conduct our own, and we would never say we don't  
20 want to see another independent appraisal.

21 THE COURT: Look, I mean, there's no question  
22 that the third-parties --

23 MR. KOSTOLAMPROS: But it's got to be --

24 THE COURT: -- have a real interest in  
25 preserving value. You have the same interest, and

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1 they've got a lot of experience with this, right? That  
2 is clearly what Judge Bianco was recognizing, right? But  
3 look, the government has a lot of experience in all of  
4 these matters, as well.

5 So I think you would take advantage -- the  
6 government should take advantage of this expertise. They  
7 should try to go down the road of interlocutory sale, and  
8 -- but that's collaboratively with the third parties who  
9 are willing to pay for an appraisal for you to look at.

10 MR. KOSTOLAMPROS: Your Honor, I --

11 THE COURT: Let me hear about that, if you  
12 think that makes sense.

13 MR. KOSTOLAMPROS: I think that makes sense,  
14 your Honor. I think the first step in the process is the  
15 appraisal because ultimately -- and frankly, there has to  
16 be a recognition of what are we appraising, right? I  
17 mean if there's an issue as to the --

18 THE COURT: I think you're appraising the  
19 entire resort --

20 MR. KOSTOLAMPROS: But what does it --

21 THE COURT: -- even though you will still have  
22 -- you still have an argument to make to Judge Bianco  
23 that not all of it should be forfeited.

24 MR. KOSTOLAMPROS: Right.

25 THE COURT: But at this point, that's not

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1 before us.

2 MR. KOSTOLAMPROS: Right, right, right.

3 THE COURT: Right? You haven't waived  
4 anything.

5 MR. KOSTOLAMPROS: Right.

6 THE COURT: Okay. So in terms of what I would  
7 recommend because I think that's what I can do here, I  
8 would recommend that you enter -- that Judge Bianco sign  
9 a preliminary order of forfeiture that includes the  
10 additional language that the government has put forward  
11 which preserves the status quo in terms of the resort  
12 continuing to operate under these previous protective  
13 orders, and that the government, which it is willing to  
14 do, put language in there that it will not forfeit or  
15 sell the resort until the final order of forfeiture.

16 Because the government mentioned your concern  
17 with the sale of other assets?

18 MS. O'CONNOR: Do you mean seize, your Honor?

19 THE COURT: Seize, I'm sorry.

20 MS. O'CONNOR: That the Court will not seize.  
21 The only other language we would change from the draft  
22 that we provided, which is marked draft subject to  
23 further review, is that we would remove the language  
24 which says that the government's going to forfeit the  
25 proceeds of an interlocutory sale, since that is not

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1 something that has been agreed upon --

2 THE COURT: Not yet.

3 MS. O'CONNOR: -- and we would revert back to  
4 the language from our original order which would be that  
5 -- a, would be the real property and premises, and so  
6 forth.

7 THE COURT: Do you understand what she just put  
8 on the record?

9 MR. KOSTOLAMPROS: I don't.

10 THE COURT: I'm not 100 percent on it.

11 MR. KOSTOLAMPROS: Look, at the end of the day,  
12 I think -- we have concerns with the language in the  
13 proposed order of forfeiture.

14 THE COURT: Because I am focusing on paragraph  
15 3, right?

16 MR. KOSTOLAMPROS: It's not just the appraisal,  
17 your Honor, though --

18 THE COURT: No, it's not -- the appraisal is  
19 going to follow. My recommendation is that this  
20 appraisal process follow the entry of a preliminary order  
21 of forfeiture. And under this order, you still have  
22 rights in an ancillary proceeding or in the present  
23 proceeding before Judge Bianco to say -- argue that  
24 certain of these assets are not subject to forfeiture.

25 MR. KOSTOLAMPROS: Right.

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1 MR. MULRY: Your Honor, just --

2 THE COURT: But I think the preliminary order  
3 should be signed, so that it can move on.

4 MR. KOSTOLAMPROS: Well, I understand but the  
5 issue is ultimately what's in that order, right? And for  
6 us again, it's about the seizure language -- of what the  
7 seizure --

8 THE COURT: And the language is going to say  
9 that the government will not seize the resort, will  
10 continue operate under the prior protective orders, and  
11 will not seize the resort prior to a final order of  
12 forfeiture.

13 MR. MULRY: Your Honor, just a procedural  
14 question. The judge -- Judge Bianco referred this for a  
15 mediation --

16 THE COURT: Right.

17 MR. MULRY: -- with ex parte communications  
18 from the parties. I don't believe he was referring it  
19 for a recommendation from your Honor. So if there's --

20 THE COURT: Okay. Well, to the extent you  
21 wanted a mediator's recommendation, that's the mediator's  
22 recommendation. I understand it's ex parte. We have a  
23 criminal defendant here. I can't have anything ex parte.  
24 That's the problem.

25 MR. MULRY: No, my only -- the only reason I

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1 was raising this was I understood your Honor was  
2 contemplating sending some communication to the judge  
3 with a recommendation as to what should happen next, and  
4 I don't think that was contemplated by --

5 THE COURT: No, because it's not an R&R  
6 situation. It's sort of a -- it's a criminal proceeding.

7 MR. MULRY: Right.

8 THE COURT: It's not an R&R at all. It's a  
9 mediation to try to talk to you all. Because it's a  
10 criminal proceeding with a criminal defendant here, I  
11 don't think that I can appropriately talk to anybody ex  
12 parte, would you agree?

13 MR. MULRY: Oh, yes. Well, your Honor, I was  
14 not --

15 MR. KOSTOLAMPROS: I agree with that.

16 MR. MULRY: I was not suggesting that in any  
17 way.

18 THE COURT: No, no, okay. I think -- I know  
19 where you're coming from.

20 MR. MULRY: What I was suggesting, and I may  
21 have misunderstood what your Honor was saying --

22 THE COURT: No, I don't blame you for  
23 misunderstanding because I used the word recommendation,  
24 and when that comes out of a magistrate judge's mouth, it  
25 sounds like an R&R, right?

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1 MR. MULRY: Yes, exactly.

2 THE COURT: Okay. I get it. So it was just  
3 lower case "r" referred to me to possibly mediate  
4 something between the parties, the government and the  
5 third parties, that is. So to the extent that it has  
6 been -- from what I heard, it would be my mediator's  
7 recommendation that the order -- a preliminary order of  
8 forfeiture be entered, and that that order include  
9 language that the government has agreed to that the  
10 resort should continue to operate, that it will not be  
11 seized until a final order of forfeiture, and that all  
12 third-parties reserve their rights to contest what assets  
13 are subject to forfeiture, and those rights would be  
14 adjudicated -- are those rights before Judge Bianco now  
15 or do all of those rights come before Judge Bianco in the  
16 context of an ancillary proceeding?

17 MR. KOSTOLAMPROS: Your Honor, if I may add  
18 that that would be --

19 MS. O'CONNOR: No third-party rights are before  
20 the Court at this time.

21 THE COURT: There's no third-party rights  
22 before the Court now.

23 MS. O'CONNOR: No. No.

24 MR. KOSTOLAMPROS: Your Honor, if I may?

25 THE COURT: Yes.

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1 MR. KOSTOLAMPROS: The notion that the  
2 preliminary order will allow for third-parties to  
3 adjudicate in the ancillary proceeding is the very  
4 argument that we raised --

5 THE COURT: Other -- I'm not talking about --

6 MR. KOSTOLAMPROS: -- the concern that we  
7 raised to Judge Bianco.

8 THE COURT: -- I'm talking about other parties  
9 that might be out there because whoever is out there is  
10 entitled to notice of an ancillary proceeding.

11 MR. KOSTOLAMPROS: That's right, and that  
12 includes the 6,500 --

13 THE COURT: That includes you and -- it does.

14 MR. KOSTOLAMPROS: -- the 6,500 timeshare  
15 owners --

16 THE COURT: Yeah, it does.

17 MR. KOSTOLAMPROS: -- and the future share  
18 owners, who the way that that would read right now would  
19 cause sales to cease completely.

20 THE COURT: But that's not in this. That's  
21 what --

22 MR. KOSTOLAMPROS: But that's what we're here  
23 for.

24 THE COURT: That's when you're talking about an  
25 ancillary proceeding. What's in this that you're afraid

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1 is going -- that will give you some level of comfort,  
2 which is what I recommend is language that the property  
3 will not be seized before a final order of forfeiture.  
4 And that's what the government is willing to agree to.

5 MR. KOSTOLAMPROS: I know but that's the reason  
6 that -- that's the issue that we raised with Judge  
7 Bianco. And frankly, we didn't even recognize or realize  
8 that the government was taking the position that current  
9 sales and prior sales will subject to forfeiture, as  
10 well.

11 And that gets to the heart of why we cannot  
12 agree to all such language because --

13 THE COURT: You don't have to agree to the  
14 language. That's the problem.

15 MR. KOSTOLAMPROS: I know but I am trying to  
16 impress upon you, hopefully you can get the government to  
17 understand, our view is look, we have an owner right here  
18 of a property. He would never buy a property on that  
19 resort if he knew that he had to come in here, and make a  
20 showing that he was the rightful owner of that property.

21 MR. WOLINSKY: Your Honor, all you're doing is  
22 telling every past owner, and every future owner, that  
23 they're buying a lawsuit in federal court in New York.

24 THE COURT: Well, if the property is subject to  
25 forfeiture, so be it. I can't help that.

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1 MR. WOLINSKY: Well, we'll -- you're not  
2 willing to address that issue. The government is not  
3 willing to address that issue. Frankly, I don't think  
4 Judge Bianco is going to enter an order saying that the  
5 property -- that the entire resort is subject to  
6 forfeiture for very --

7 THE COURT: But isn't that a matter -- isn't  
8 that the matter under submission before him because at  
9 the end of his hearing, I believe the last thing he said  
10 is that matter is under submission.

11 MR. WOLINSKY: Right, it's under submission,  
12 and we've made arguments that that property --

13 THE COURT: And you guys can agree to settle it  
14 but you don't have to.

15 MR. WOLINSKY: Understood. The government is  
16 not willing to settle it, we obviously are.

17 THE COURT: Not on your terms, and you're not  
18 willing to settle on their terms, so --

19 MR. WOLINSKY: Your Honor?

20 THE COURT: -- that's that.

21 MR. WOLINSKY: It is beyond dispute, if we go  
22 to an ancillary proceeding, and there is published notice  
23 to 6,500 timeshare members, and 172 owners, that their  
24 interests -- their existing interests are subject to  
25 forfeiture, and the next thing you know, it goes on the

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1 friends of Diamante home-book page, and the next thing  
2 you know, it's in the New York Post, and then after that,  
3 it's in the Wall Street Journal, and it's in Sporting  
4 News because there are a lot of well-known sporting  
5 figures who own property, sales are going to stop.

6 THE COURT: And you've impressed that upon the  
7 government, probably more than once. Am I right? And  
8 you're --

9 MS. O'CONNOR: Well --

10 THE COURT: -- not interested in making any  
11 changes because you --

12 MS. O'CONNOR: The government is --

13 THE COURT: Tell me your view.

14 MS. O'CONNOR: Our view is that this forfeiture  
15 proceeding has been out there in the news for years. The  
16 protective order says it's forfeitable. Nothing has  
17 changed that would require us to change anything or at  
18 least give up the right to forfeit the property. You  
19 know, that's the legal right here, and then the third  
20 party's interest will be resolved later.

21 And we would point out that paragraph 7 of the  
22 revision we provided to them, adds a paragraph saying at  
23 their request, that it adjudicates the government's  
24 interest without regard to any third-party's interest.  
25 It's very clear.

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1 THE COURT: Which is what I said when I  
2 mentioned it's without prejudice.

3 MS. O'CONNOR: Exactly.

4 MR. WOLINSKY: Your Honor, what is going to  
5 change, and I'm at a loss to understand why the  
6 government does appreciate this, what is going to change  
7 is publicity.

8 THE COURT: You haven't had any publicity about  
9 this criminal proceeding at all?

10 MR. WOLINSKY: Criminal proceeding, yes.  
11 Anyone --

12 THE COURT: And the criminal proceeding didn't  
13 involve the name of this resort?

14 MR. WOLINSKY: Yes, if you do -- if you Google  
15 the property like I did before I purchased, I would have  
16 seen that Mr. Kenner originally filed a lawsuit against  
17 Mr. Jowdy accusing him of fraud --

18 THE COURT: Right.

19 MR. WOLINSKY: -- that lawsuit was dismissed.  
20 The government indicted Mr. Kenner, and Mr. Kenner turned  
21 out to have snuckered the hockey players into wrongly  
22 suing Mr. Jowdy. That's what you will find out.

23 THE COURT: And if you were to Google this  
24 resort, you might find this forfeiture proceeding too.

25 MR. WOLINSKY: And if you Google --

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1 THE COURT: I can't help that.

2 MR. WOLINSKY: Well, no, you can't help it but  
3 maybe you can talk some sense into the government. What  
4 we're proposing is very simple. Let's find out whether  
5 there's any equity in this project to be fighting over.

6 THE COURT: Well, the government has agreed to  
7 this appraisal procedure.

8 MR. WOLINSKY: So --

9 THE COURT: So you want to hold off the  
10 preliminary order of forfeiture until the appraisal  
11 proceeding?

12 MR. WOLINSKY: Here's what I am proposing, and  
13 I think it's very sensible. The first thing that has to  
14 happen is Mr. Kenner has to be sentenced, and we  
15 appreciate that, and there can't be any sentencing until  
16 there's a preliminary order of forfeiture.

17 The Federal Rules of Criminal Procedure provide  
18 a mechanism for dealing with the circumstance where the  
19 exact scope of the property that's subject to forfeiture  
20 is indeterminate, and it provides that the Court can --  
21 we can forfeit Mr. Kenner's interest, start right there.

22 THE COURT: So -- right, it has to be  
23 traceable. I understand that. But --

24 MR. WOLINSKY: And then --

25 THE COURT: -- one thing you said is that Mr.

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1 Kenner is entitled to be sentenced, and he can't be  
2 sentenced before this order of -- preliminary order is  
3 in; is that correct?

4 MR. WOLINSKY: That's my understanding.

5 THE COURT: I ask the government, is that  
6 correct? So he's entitled to be sentenced and his  
7 sentence is held up because we don't have the preliminary  
8 order of forfeiture?

9 MR. SOUTHER: Well, that's not entirely the  
10 case. Look, we're not parties to the case but we've  
11 attended some of these proceeding. I think there have  
12 been other delays that have contributed to it.

13 THE COURT: Okay, but that's a matter of  
14 criminal procedure, and criminal law, right? Let me ask  
15 the government, you know more about criminal procedure  
16 than I do. In terms of the sentencing of this defendant,  
17 what's the time table? Can he not be sentenced until  
18 there's a preliminary order of forfeiture?

19 MS. O'CONNOR: There has to be a preliminary  
20 order of forfeiture, and then the forfeiture has to be  
21 pronounced at the sentence, so this is a necessary step.

22 THE COURT: To the sentencing.

23 MR. WOLINSKY: Yes.

24 MS. O'CONNOR: Absolutely.

25 MR. WOLINSKY: That's my understanding. I'm

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1 not a criminal lawyer, but that can address Mr. Kenner's  
2 interest. It doesn't have to address all the homeowners,  
3 and all the timeshare members.

4 THE COURT: There's a lot of interest here.  
5 Mr. Kenner has an interest to be sentenced. There are  
6 people who are adjudicated to have been defrauded in the  
7 criminal proceeding, and there's the interest of third  
8 parties, and there's an orderly way of doing that --

9 MR. WOLINSKY: Right.

10 THE COURT: -- and hopefully the orderly way is  
11 what's in the Federal Rules of Criminal Procedure 32.2.  
12 I do think that that envisions the first step being a  
13 preliminary order of forfeiture. I do think that there  
14 are important rights here that have to be considered. I  
15 think the government is well aware of it. They may be  
16 well aware at this point of maybe rolling the dice and  
17 going ahead with this language but I think that's the  
18 order in which it has to be.

19 Again, I'm not the district judge. I'm not  
20 even referenced on a settlement conference because it's  
21 not a civil case, it's a criminal proceeding. I've heard  
22 from everybody, and again to the extent I'm making a  
23 mediator's recommendation, that's really the only  
24 recommendation I can see going forward because I am not  
25 seeing a lot of common ground.

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1           So if I have to say it again, the  
2 recommendation is that the order be entered with the  
3 stipulation that the government is not going to seize  
4 anything at this time, not going to seize until the end,  
5 and also that the parties go forward with a possible  
6 interlocutory sale, the first step being an appraisal and  
7 the government be open to seeing what the appraisals look  
8 like. Again, it's basically a status quo.

9           MR. KOSTOLAMPROS: Well, your Honor, again, I  
10 think --

11          THE COURT: We can argue all day --

12          MR. KOSTOLAMPROS: Right, but I mean --

13          THE COURT: -- but this is what you call  
14 impasse.

15          MR. KOSTOLAMPROS: And I agree with you there  
16 but I think we were there before Judge Bianco --

17          THE COURT: Well, you're still there.

18          MR. KOSTOLAMPROS: -- and we made these  
19 arguments, and Judge Bianco told the government listen to  
20 them.

21          THE COURT: But he didn't tell the government  
22 what they had to do. He told them to listen, and I think  
23 they've listened as much as they --

24          MR. KOSTOLAMPROS: Right, but I think if we --

25          THE COURT: Listening doesn't mean agreeing

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1 with you.

2 MR. KOSTOLAMPROS: But I think if we go back to  
3 Judge Bianco, as Mr. Wolinsky said, I think that Judge  
4 Bianco was very open to listening to our concerns and  
5 recognizing those concerns.

6 THE COURT: And the government isn't denying  
7 that.

8 MR. KOSTOLAMPROS: Right, right.

9 THE COURT: Is that what you're saying? Okay.

10 MR. KOSTOLAMPROS: I am but I am --

11 THE COURT: That's fine. That's fine.

12 MR. KOSTOLAMPROS: -- trying to impress upon  
13 you that I don't think -- and for us, the seizure  
14 language that you're recommending as a mediator here,  
15 does not solve our problem, and our problem is not just  
16 side this, it's the government's side, as well because it  
17 will devalue the resort, because the resort will not be a  
18 going concern.

19 THE COURT: Understood. Anything further from  
20 the government? Any final remarks you would want to  
21 make?

22 MS. O'CONNOR: No, your Honor.

23 THE COURT: Okay. All right. Thank you.

24 IN UNISON: Thank you, your Honor.

25 THE DEFENDANT: Your Honor, there is one --

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1 THE COURT: Do you want these back?

2 (Indiscernible). Go ahead.

3 THE DEFENDANT: Your Honor, there is one other  
4 issue that when Mr. Jowdy's representatives are going  
5 from the courtroom, there I was a little I submitted ex  
6 parte, I just wanted to put on the record with you, and  
7 the government and stay present for it. It's ex parte  
8 but we may need their assistance.

9 THE COURT: Did the government have it? When  
10 you say ex parte --

11 THE DEFENDANT: No.

12 THE COURT: -- ex parte to Judge Bianco?

13 THE DEFENDANT: Yes, that's correct.

14 THE COURT: That's not before me.

15 THE DEFENDANT: Okay.

16 THE COURT: That's something you submitted to  
17 Judge Bianco ex parte?

18 THE DEFENDANT: Two weeks ago. I'm just not  
19 sure if it ever arrived here.

20 THE COURT: You didn't see it on the docket?

21 THE DEFENDANT: But it's an issue --

22 THE COURT: Do you have access to the docket?

23 THE DEFENDANT: I don't have access to the  
24 docket.

25 THE COURT: Does the government know what the

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1 defendant is talking about?

2 MR. HAGGANS: Your Honor, the defendant has  
3 made a number of ex parte filings in the case, because I  
4 don't receive the filings --

5 THE COURT: Right, you don't have it.

6 MR. HAGGANS: -- it's difficult for me to track  
7 which filing he may be --

8 THE COURT: And to the extent it's ex parte,  
9 it's not to me, ex parte. It's to Judge Bianco.

10 MR. HAGGANS: It would not be to you, your  
11 Honor, it would be to Judge Bianco, yes.

12 THE COURT: So --

13 THE DEFENDANT: Well, your Honor, if Mr.  
14 Jowdy's parties are all absent from the courtroom, I  
15 don't have any problem addressing it with your Honor and  
16 with the government because we probably need their  
17 assistance.

18 THE COURT: But again, it's not mine, it's  
19 Judge Bianco's.

20 THE DEFENDANT: I understand and I appreciate  
21 that. The issue actually is with the government and I  
22 need their assistance. I didn't have any communication  
23 with the government, so I had to send it --

24 THE COURT: Just one second.

25 Mr. Haggans, are you handling the criminal side

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1 of this case?

2 MR. HAGGANS: I am, your Honor.

3 THE COURT: And not the forfeiture side?

4 You're on the criminal --

5 MR. HAGGANS: We're all on the team, your

6 Honor.

7 THE COURT: I understand you're all together,

8 but -- all right. So --

9 MR. HAGGANS: I am happy to remain for whatever  
10 assistance the Court may require.

11 THE COURT: Okay. Third parties can go home.

12 IN UNISON: Thank you, your Honor.

13 (Ex parte portion begins at 3:34:46 PM)

14 MR. HAGGANS: Your Honor, I believe one of the  
15 third-party counsels left a bag in the jury room, so he  
16 may need some assistance to get that.

17 THE COURT: Oh, that's too bad.

18 (Pause)

19 THE COURT: So I am just noting that we have  
20 the defendant in the courtroom. We have the government  
21 in the courtroom. The third-party lawyers have left but  
22 this is nonetheless an open courtroom. This is not a  
23 sealed proceeding.

24 Mr. Kenner, do you understand that?

25 THE DEFENDANT: Yes, it's an interested party,

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1 a former co-conspirator, Mr. Jowdy is in the back, if we  
2 could ask him to leave.

3 THE COURT: I really can't. I can't seal the  
4 courtroom.

5 MR. HAGGANS: Your Honor, the courts are open.

6 THE COURT: No, I agree with you. I can't seal  
7 the courtroom. I would also note, just for the Court's  
8 attention, and information, that Mr. Kenner is proceeding  
9 pro se at this point, which may have been obvious from  
10 the proceeding but I wanted that noted on the record.

11 THE COURT: Okay. So again, this is an open  
12 courtroom. I don't have the courtroom closed. You  
13 submitted something under seal. I understand you've  
14 submitted it to Judge Bianco, not to me.

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: You expressed that you wanted to  
17 put something on the record in open court. I don't know  
18 if you want to do that but I want to make clear, this is  
19 an open court proceeding. The transcripts are open, as  
20 well.

21 THE DEFENDANT: Okay?

22 THE COURT: All right. I can put on the record  
23 that you have put something on the docket but I can just  
24 leave it at that because again, it's not before me.

25 THE DEFENDANT: I understand, your Honor. The

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1 simple issue is there was some government discovery  
2 delivered to me pre-trial in early 2015 on a government  
3 jump drive, a Lexar jump drive. It had password  
4 KENNER2015!.

5 THE COURT: And what about it?

6 THE DEFENDANT: Well, it was delivered when I  
7 was changed from GEO Queens facility to MDC Brooklyn on  
8 April 22nd of 2015. The U.S. Marshals delivered my  
9 laptop, several hundred CDs, a hard drive and a jump  
10 drive.

11 THE COURT: And this is what's in the letter to  
12 Judge Bianco?

13 THE DEFENDANT: Yes, ma'am, yes, ma'am.

14 THE COURT: Okay. So I know what that is.

15 THE DEFENDANT: Okay.

16 THE COURT: That's under seal and that is on  
17 the record. So Judge Bianco does have access to it.  
18 That's all I can assure you about that.

19 THE DEFENDANT: Okay. I was --

20 THE COURT: And I don't think you should speak  
21 any further about it right now because I don't think the  
22 government is prepared, they haven't seen it. I don't  
23 know what they can add to it. I can just assure you it's  
24 on the docket. The judge has it.

25 THE DEFENDANT: Okay.

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1 THE COURT: Okay.

2 THE DEFENDANT: If I can -- if I could just  
3 speak to that, I don't have access to the docket or the  
4 docket materials. The government had, when they  
5 delivered that particular jump drive in or about February  
6 of 2015, there was a letter that had corresponded with it  
7 several times about the password and I really just need a  
8 copy of that letter for the folks at MDC.

9 THE COURT: Okay. So let me ask you is this.  
10 Is that letter under seal to Judge Bianco because you  
11 requested it be under seal?

12 THE DEFENDANT: No, that's how Judge Bianco  
13 told me to communicate with him if it was a --

14 THE COURT: Okay, well then he's well aware of  
15 it. There's nothing really to be done here or with the  
16 attorneys in court here today, because as I said, they  
17 haven't seen it. And to the extent you wanted to file  
18 something, Judge Bianco told you to file it under seal.  
19 So there's really nothing more to be done on that.

20 THE DEFENDANT: Okay. Does your Honor have a  
21 recommendation how I can get a copy of the letter that  
22 accompanied the jump drive back in 2015?

23 THE COURT: Well, that's what you asked Judge  
24 Bianco, right? So he'll respond to that.

25 THE DEFENDANT: Part and parcel, yes.

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1 THE COURT: Yeah, okay. He'll respond.

2 THE DEFENDANT: Okay. All right.

3 THE COURT: All right, thank you.

4 THE DEFENDANT: Thank you, your Honor.

5 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 16th day of May, 2019.

  
Linda Ferrara

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